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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1255

CARLOS MARCELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Carlos Marcello, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed orders of the United States District Court for the Southern District of Texas denying a motion for a new trial upon the basis of suppression of evidence and an application under 18 U.S.C. 2255.

OPINIONS BELOW

The District Court rendered no opinion. Its orders were filed on July 22, 1970, and September 3, 1970. The opinion (Appendix A) of the Court of Appeals is unreported and was filed on January 4, 1971. Its judgment of affirmance was entered on the same day (Appendix B). This Court's prior orders herein are set forth in 398 U.S. 959 (1970) and 91 Sup. Ct. 7, 13 (1970).

JURISDICTION

The judgment of the Court below was entered on January 4, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the willful and deliberate suppression of evidence by the prosecution herein that the FBI caused the harassing convocation of the news media to meet petitioner's plans, thereby staging the exasperating circumstances within which acting the alleged assault and/or intimidation of an undisclosed FBI agent, violates due process and requires the grant of a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963). This evidence, suppressed intentionally by the Government, was called for by repeated motions of defense counsel.

2. Whether the suppressed evidence related to the credibility of federal agents who in testifying denied any knowledge of the convocation of the news media. Whether the suppression of evidence that the complaining witness, FBI Agent Collins, was drunk on the day of the assault, violates due process and requires a new trial.

3. Was it harmless error, beyond a reasonable doubt, not to present the suppressed evidence to the jury?

4. Was it proper to deny, without an evidentiary hearing, petitioner's application under 18 U.S.C. 2255, alleging that

the conviction herein was obtained by knowing use of perjured testimony by the complaining and principal Government witness, Patrick Collins? Was the denial contrary to *Sanders v. United States*, 373 U.S. 1 (1963)?

5. Where the District Court denied petitioner's application under 18 U.S.C. 2255, alleging the knowing use of perjured testimony, upon the improper ground that such application was previously adjudicated in the new trial motion and where the Government did not file a responsive pleading or contest the sufficiency of the allegations in the application, was it proper for the Court of Appeals, *sua sponte*, to affirm upon the ground that the application failed to set forth sufficient evidence of perjury without affording petitioner an opportunity to amend? Was this contrary to *Price v. Johnston*, 334 U.S. 266 (1948), and *Sanders v. United States*, 373 U.S. 1, 19 (1963)? Was the application under 18 U.S.C. 2255 legally sufficient and not subject to attack where no governmental objection had been interposed?

STATEMENT OF THE CASE

On September 30, 1966, petitioner's counsel informed the F.B.I. in New York City in response to its request that petitioner and his brother, Joseph Marcello, would proceed from New York City to New Orleans, by Delta Airlines. This was done with petitioner's approval (R. 1172-4).[1] Upon arrival at the Moisant International Airport in New Orleans, petitioner was surrounded by a group of news photographers, using flash bulbs and bright lights, and newspapermen who followed him from the point of deplaning through the airport and to his son's car which was parked on the outer ramp. F.B.I. agents, Joseph Arrigone and Patrick J. Collins, were assigned to take photographs and conduct surveillance of Marcello at the airport. Collins, in

[1] "R." references are to the original record (Oct. Term, 1969, No. 1488). "A." references are to the record in the post conviction proceedings.

shirt sleeves holding his suit jacket, posed as a deplaning passenger (R. 858-9, 887-8, 931-3, 979). Avignone, in shirt sleeves, carried a camera and took photographs (Gov't Ex. 6). Neither agent identified himself to Marcello (R. 887-8).

After reaching the upper ramp outside the airport building, petitioner, angrily and with some profanity, inquired whether the photographers had secured enough pictures. Collins, with his hands folded, asserted in the negative. Thereupon, Marcello asked: "Are you looking for trouble?" Collins replied: "I can handle trouble" (R. 939). There is confusion among prosecution witnesses as to whether bodily contact was made with Collins and whether with Marcello's right or left hand (R. 880-1, 903-4, 908, 921-9, 1033-4, 1047-8, 1293, 1299, 1308). A photograph (Govt's Ex. 6) and the Associated Press photographer who took the exhibit established beyond any doubt that Marcello never raised his right hand (R. 921, 924, 929). Marcello and his witnesses denied the assault (R. 1152-4, 1174-9, 1203-5).

Complaining and chief prosecution witness, F.B.I. agent Collins, testified that the report (Gov't Ex. 7) he prepared immediately after the incident contained a full, complete and true account of the incident herein (R. 965). This report, introduced in evidence by the Government (R. 1002), stated:

> "SA JOSEPH M. AVIGNONE was standing with the photographers carrying a camera. It appeared to me that the MARCELLOs might take immediate physical action against the photographers and newspapermen so I moved up through the crowd toward the MARCELLO party and took a position next to SA AVIGNONE, facing CARLOS and JOSEPH MARCELLO.
>
> CARLOS MARCELLO directly faced me and said 'I'm the boss here. Are you looking for some (obscene) trouble?' I crossed my hands on my chest and stated to CARLOS MARCELLO, 'I can handle trouble.'

> CARLOS and JOSEPH MARCELLO simultaneously closed the distance between myself and them, and CARLOS MARCELLO brought his right hand with his fist closed toward me in a roundhouse blow. Simultaneously with his commencing of a blow, JOSEPH MARCELLO grabbed his arm and attempted to restrain him. I immediately took a counter-punch position with my hands open.
>
> CARLOS MARCELLO did not get to strike a blow due to his brother's immediate action and the unknown individual's action shortly thereafter. I struck no blow due to the fact that I would not strike a blow unless one of these individuals struck first."

Collins thereafter contradicted himself to say that Marcello first jabbed with his left and then attempted a right hand blow (R. 941, 955). The foregoing incident resulted in petitioner's conviction on September 12, 1968 in the Southern District of Texas for assaulting and/or intimidating an F.B.I. agent contrary to 18 U.S.C. 111.[2] The conviction was affirmed on appeal, 423 F.2d 993 (5th Cir., 1970), and certiorari was denied, 398 U.S. 959 (1970). Thereafter, on June 19, 1970, a motion was filed for a new trial (A. 1), alleging, among other things, suppression of evidence, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963).

An evidentiary hearing, held on July 21 and 22, 1970, produced, at long last, the testimony that the F.B.I. agent in charge of the New Orleans office on September 30, 1966, Joseph Sylvester, had made telephone calls on that date to the Association Press, local newspapers and local television channels to cause a convocation of the news media at the airport (A. 102, 107, 113). Agent Sylvester acknowledged that the information was known to the two prosecutors at the Laredo and Houston trials (A. 111). The evidence had been sought at trial in the examination of F.B.I. Agents

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[2]Petitioner was originally sentenced to two years and fined $5,000.00. On October 13, 1970 the District Court reduced the sentence to six months, two year probation and a fine of $5,000.00.

Avignon (R. 876) and Kelleher (R. 1125-7). A written motion requesting favorable evidence had been made prior to trial (R. 26), renewed prior to the second trial (R. 292, 385), and during trial (R. 1070-5). The government replied orally and in writing that it had no such evidence (R. 170, 292-4, 1070-1).

The following occurred at the first trial in Laredo, upon a specific request for this vital evidence:

> "Mr. Wasserman: I think they arranged this convocation of news media.
>
> "Mr. Neff: I resent that, your Honor.
>
> "Mr. LaCour: I do too. This is not the first time this man was in the news.
>
> • • •
>
> "And I say we resent that Mr. Wasserman is saying that we tried to set this man up.
>
> "The Court: Whether you resent it or not, he is entitled to make his point, and we will go into that on trial.
>
> "I think I will withhold ruling on this, and if it develops that you are entitled to it, I will rule."
>
> (R. 344-347)

With the motion for a new trial, request was again renewed for a favorable evidence under *Brady*. At first, the government repeated its denial that they had no *written* statements supporting the sought-after evidence (Tr. 19-21, 160-162).[3] Under pressure, the government finally tendered this favorable evidence under *Brady* through the oral testimony of Agent Joseph Sylvester, as well as the admission that this evidence was known to the prosecutors before the Laredo trial (A. 100-3, 111-2).

In addition to the foregoing, evidence was adduced at the new trial hearing that on September 30, 1966, Agent Collins had attended a press party with a William Perry

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[3]Transcript of July 21 & 22, 1970.

Brown from noon until 3:30 p.m., had consumed twelve or more cocktails during this period, and became highly intoxicated (A. 54-60). Significantly, Collins did not deny this occurrence or his drunkenness, but only testified that he now fails to remember it (A. 37, 85-86). The government merely produced witnesses who alleged that Collins did not appear to be drunk between 3:30 p.m. and 9:30 p.m., the time when the alleged assault occurred (Tr. 229, 242). No objection was made by the government that this issue was not within the pleadings.

The District Judge, instead of applying *Brady* standards to the suppressed evidence herein, ruled on July 22, 1970, that the Court and jury *suspected* the fact that the F.B.I. had convened the news media on September 30, 1966, but that he could not declare that it would have changed the result (Tr. 299, 311-314). Upon this basis, a new trial was denied.

On August 25, 1970, petitioner filed an application (A. 122) under 18 U.S.C. 2255 alleging that the conviction herein was obtained through the perjury, knowingly used, of the complaining and principal prosecution witness, F.B.I. Agent Patrick Collins. The particular items of perjury were detailed in the application. No responsive pleading was filed by the Government. On September 3, 1970, the District Judge in a written letter to counsel denied relief without an evidentiary hearing, stating:

> "The factual basis contained in the present motion * * * was for all intents and purposes presented and considered by this court's ruling on the defendant's motion for a new trial. Therefore, the present motion * * * is overruled."

The Court of Appeals ruled that the record did not support the District Court's stated basis for denying relief under 18 U.S.C. 2255. Instead, *sua sponte*, it declared that petitioner "has offered no evidence, other than that upon which the jury passed" and therefore, an evidentiary hearing was not required (Appendix A, p. A-9). The denial

of the new trial motion was sustained upon the ground that the suppressed evidence related solely to a defense of entrapment and was not material or relevant to establish such defense (Appendix A, pp. A-4 to A-6).

STATUTES INVOLVED

18 U.S.C. 111 provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both."

28 U.S.C. 2255 provides in part:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. As Justices Black and Douglas observed in reviewing the bail application herein, the "entire case and circumstances shown by the record are highly disturbing." The

Government prosecutors deliberately suppressed favorable evidence herein which should have been presented to the jury. Their conduct "in this case raises questions worthy of review," 91 Sup. Ct. 14, 15. In 1961 Marcello was illegally deported to Guatemala upon the basis of a birth record known to the Government to be forged [see records in *United States v. Marcello*, Cr. No. 28365, E. D. La., and *Marcello v. Kennedy*, 194 F. Supp. 748, reversed 312 F.2d 874 (D.C. Cir., 1962) cert. denied 373 U.S. 933]. Now, once again, the Government has knowingly utilized ignoble tactics in its dealing with petitioner. These repeated violations of law by those entrusted with its enforcement should not go unnoticed.

2. The suppression of evidence herein related to nondisclosure that the F.B.I. had arranged for the news media to meet Marcello on September 30, 1966, at the airport, as well as the fact that F.B.I. Agent Collins had been drunk at 3:30 p.m. on that date. These items of evidence were highly significant.

The accused is entitled to have the jury consider *any* theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous. *United States v. Grimes*, 413 F.2d 1376 at 1378 (7th Cir. 1969). The prosecutors, by failing to disclose the evidence as required by *Brady v. Maryland* and by the use of perjured and false testimony, prevented petitioner from using evidence bearing on provocation, entrapment, good faith of the prosecution, and the credibility of government agents. Even relatively slight evidence of inducement will require submission of the entrapment defense to the jury. *United States v. Henry*, 417 F.2d 267, 269 (2d Cir., 1969), and *Sorrells v. United States*, 287 U.S. 435 (1932). Although the District Court may not have erred in refusing to charge the jury on entrapment on the facts presented at trial, (R. 1408) it was a clear violation of petitioner's due process rights, which are grounded in fairness, for the government to suppress, deliberately, the evidence which would have been an integral and first step in the defense of entrapment.

Provocation is an issue properly before the jury in an assault case. There was here a denial of the information that the exasperating harassment petitioner suffered leading up to and including the incident was staged or produced by the government. Clearly, it has a bearing upon the charge of intimidation. This new evidence would make a jury ponder who, Collins or Marcello, was assaulted, intimidated, impeded, opposed, or interferred with. For the government to convict an individual for a crime which it has provoked, violates the fundamental fairness which due process is designed to protect. To suppress evidence of provocation is a deprivation of due process.

The government, through its prosecutors, decided for the Court, for the defense, that the information in its possession should be suppressed. If this evidence was benign, why suppress it? And if from the defense, why from the Court? This conviction is tainted by an outrageous deliberate failure to disclose on the part of the government.

The suppressed evidence was and is, ". . . substantial evidence which should have been but never was submitted to the jury," the only tribunal entitled to pass upon it. *U.S. ex rel Thompson v. Dye*, 221 F.2d 763, (3rd Cir. 1955) cited with approval in *Brady v. Maryland, supra.*

3. The suppression of Collins' drunkeness on the day of the incident and Collins' inability to recall events of that day are another example of the fact that the defense and consequently the jury were without the necessary information requisite to a just verdict. The government did not make an attempt to deny this testimony adduced at the hearing on the motion, but rather merely countered with FBI evidence that he (Collins) appeared later in the day to be sober. It makes no difference. Non-disclosure by Collins is fatal. He is part of the prosecution. *Barbee v. Warden*, 331 F.2d 842 (4th Cir., 1964).

The Government raised no objection to petitioner's failure to allege Collins's drunkenness in his motion for a new trial. The District Court and the Government permitted

production of evidence on this issue (A. 54-60, Tr. 229, 242) and treated the same on its merits. The Court of Appeals, *sua sponte*, would deny consideration to Collins' drunkenness because of technical failure to mention the same in the motion for a new trial. This technical failure was waived by absence of objections in the District Court. Moreover, if specific mention of it is required, the issue is raised in the 2255 application.

4. The evidence suppressed clearly bore on credibility in a closely contested case where there had been an earlier disagreement by a jury. Suppression of evidence relating to credibility violates due process and requires a new trial. *Napue v. Illinois*, 360 U.S. 264 (1959), *Giles v. Maryland*, 386 U.S. 66 (1967). Where, as here, the issue of credibility between complaining witness, F.B.I. Agent Collins, and petitioner was brought into sharp focus, the suppression of evidence relating to the character and the credibility of Collins was vital evidence amounting to a denial of due process. *Curran v. Delaware*, 259 F.2d 707 (3d Cir., 1958). The suppressed evidence cast doubt upon the credibility of the F.B.I.[4] and its operational methods in this case. It was vital and material evidence which should have been presented to the jury.

The District Judge erroneously denied a new trial upon the mistaken premise that it was unwarranted since due diligence was not exercised[5] and since the court could not state that the trial result would have been different if the

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[4]FBI Agent Kelleher testified that only he, Collins and Avignone were aware of Marcello's contemplated arrival (R. 1126). This false testimony misled counsel by its failure to mention Agent Sylvester, who alerted the news media. This glaring error of Kelleher, if exposed to the jury, would have had a damaging effect upon the prosecution's case.

[5]As we observe in footnote 4, *supra*, counsel was misled by the false testimony of F.B.I. Agent Kelleher. Moreover, denial of due process under *Brady* is not dependent upon due diligence of counsel. *Barbee v. Warden*, 331 F.2d 842 (4th Cir., 1964); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3rd Cir., 1955).

suppressed evidence had been made available. This was not the correct standard nor the requisite findings where the constitutional rights of a defendant have been infringed.

The Court of Appeals did not assess the relevancy of the suppressed evidence in a jury case. This suppressed evidence clearly related to admissible testimony involving the circumstances which led up to the assault and would have had great impact upon the jury. Instead, the opinion below merely finds it irrelevant to the issue of entrapment and without favorable defense quality on this score.

The proper approach to the so-called *Brady* quandary is evidenced by the cases which repeatedly state that the courts will not "speculate as to the effect this (suppressed) testimony would have had on the jury." *U.S. ex rel Meers v. Wilkins*, 326 F.2d 135 (2d Cir., 1964), or that it is speculation to say that such testimony "would not have influenced the fact finders." *Hamric v. Bailey*, 386 F.2d 390 (4th Cir., 1967), *U.S. ex rel Thompson v. Dye*, 221 F.2d 763 (3d Cir., 1955), cited with approval by the Court in *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), observes with regard to the suppressed evidence:

> "It was substantial evidence which should have been but never was submitted to the jury (the only tribunal entitled to pass upon it) in connection with what the court did charge. . ."

People v. Savvides, 1 N.Y.2d 554 (1956), *Kyle v. United States*, 297 F.2d 508 (2d Cir., 1961), and *Napue v. Illinois*, 360 U.S. 264 (1959), require that the suppressed testimony or false testimony merely be "in any way relevant to the case". Under such circumstances, reversal is required.

People v. Savvides, supra, quoted with approval in *Napue v. Illinois*, 360 U.S. 264 (1959), states:

> "Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. The argument overlooks the various functions to be performed by

> jury and reviewing tribunal. It is for jurors, not judges of an appellate court, such as ours, to decide the issue of guilt."

Jackson v. Wainright, 390 F.2d 288, 289-9 (5th Cir., 1968), involved an eyewitness in a rape case, who had told the police that the assailant was not a negro. The prosecution merely advised defense counsel that the eyewitness could not identify the defendant, who was of the negro race. The eyewitness did not testify at the trial.

The court ruled that the suppression of this evidence was highly reprehensible and that it:

> "cannot be assumed that this evidence would not have affected the jury's deliberations, had it been made available to the defense."

The court, also, noted:

> "Before a federal constitutional error can be held harmless, the court must be able to declare (a belief) that it was harmless beyond a reasonable doubt. (*Chapman v. State of California*, 386 U.S. 18 (1967), 17 L. Ed. 705)."

These cases emphasizes the error of the court below and that of the District Court which believed that it had to state affirmatively that the suppressed testimony would have produced a different result. On the contrary, the standard is whether it would have been relevant in any way in the jury's deliberations. There is no reversible error, only where the court can declare beyond a reasonable doubt—and the District Court made no such finding—that the error was harmless or that the suppressed evidence would not have been relevant. The failure to apply the proper standard or make the requisite findings requires reversal of the denial of petitioner's motion for a new trial and merits review by this Court.

5. The District Court erroneously assumed that the June 1970 motion for a new trial was similar "for all intents and purposes" to the August 1970, 2255 application and denied the latter upon the ground that it was previously con-

sidered. This is not supported by the record as the Court of Appeals found. The 2255 application clearly asserts that the conviction was obtained through the perjury of F.B.I. agent Collins, a ground not previously urged, considered, or decided. Perjury was alleged in the following particulars:

"(a) His testimony at the trial relating to his account of the alleged assault and intimidation.

"(b) His testimony at the trial denying admissions by Collins that Carlos Marcello did not assault or intimidate him on September 30, 1966.

"(c) His testimony at the trial relating to his activities and admissions of no assault and intimidation by Carlos Marcello to witnesses in Shreveport, Louisiana, in February, 1968.

"(d) His testimony at the trial relating to admissions of no assault and intimidation by Carlos Marcello to witnesses at Lucky Pierre's in and about November or December, 1967.

"(e) His statements on the Motion for a New Trial denying any memory of attending a press party on September 30, 1966, and of being drunk on that date."

A motion for post-conviction relief may be denied without a hearing only if the motion and the files and records in the case conclusively show that the defendant is entitled to no relief or if the grounds for relief relied upon were previously determined adversely on the merits after a hearing and the ends of justice would not be served by reconsideration. *Sanders v. United States*, 373 U.S. 1 (1963); *Kaufman v. United States*, 394 U.S. 217 (1969); *Tucker v. United States*, 427 F.2d 615, 617 (D.C. Cir., 1970).

The Court of Appeals, affirming the District Court on grounds not urged by the Government, found the 2255 application legally insufficient contrary to this Court's rulings in *Price v. Johnston*, 334 U.S. 266 (1948), and *Sanders v. United States*, 373 U.S. 1, 19 (1963).

In *Price v. Johnston*, *supra*, Price alleged in his fourth application:

> "That the government knowingly employed false testimony at the trial to obtain the conviction."

The court held that to attack the sufficiency of this pleading, a motion in the District Court should first be made. This is so that there may be an opportunity to amend in that court.

Sanders v. United States, supra, observed:

> "Petitioner's first motion under 2255 was denied because it only stated a bald legal conclusion with no supporting factual allegations. The Court had the power to deny the motion on this ground, see *Wilkins v. United States*, 103 App. D.C. 322, 258 F.2d 416 (C.A.D.C. Cir. (1958), although the better course might have been to direct petitioner to amend his motion. See *Stephens v. United States*, 246 F. 2d 607 (C.A. 10th, Cir. (1957)) (per curiam) but the denial, thus based, was not on the merits."

As *Sanders, supra*, notes, bald legal conclusions are objectionable. See also *Wilkins v. United States*, 258 F.2d 416 (D.C. Cir. 1958) where an allegation that defendant pleaded guilty through "subterfuge" of his counsel was held insufficient and *Stephens v. United States*, 246 F.2d 607 (10th Cir. 1957) where an allegation of coercion upon defendant to plead guilty was held conclusory.

On the other hand, it must be remembered that many 2255 applications are filed by prisoners who have no legal training. Liberality should, therefore, follow analysis of these applications, especially where they adequately inform the government of the applicant's claim. Meticulous insistence upon regularity in procedural allegations is not required, *Gibbs v. Burke*, 337 U.S. 773, 779 (1949).

In the instant case, there is no bald legal conclusion of perjury. On the contrary, the specific statements claimed to be false and given at the trial are enumerated. The government was adequately advised of petitioner's claim. Significantly, the government has not moved to dismiss the allegations for insufficiency or deficiency as required by *Price* and *Sanders, supra*.

It may well be that the jury believed Collins and others whose testimony is here under attack. However, due process will not tolerate a conviction obtained by the knowing use of false testimony, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Guerrero v. Beto*, 384 F.2d 886 (5th Cir. 1967).

Allegations of the knowing use of perjured testimony require an evidentiary hearing, *Price v. Johnston*, 334 U.S. 266 (1948); *Sanders v. United States*, 373 U.S. 1 (1963), here erroneously denied to petitioner.

Indictments for perjury do not require allegations of evidence but merely sufficient allegations of the elements of the offense to apprise a defendant of the nature of the charges. *United States v. Debrow*, 346 U.S. 374 (1953); *United States v. Nicoletti*, 310 F.2d 359 (7th Cir., 1963), cert. denied 372 U.S. 942; *Claiborne v. United States*, 77 F.2d 682 (8th Cir., 1935). A defendant should not be required to state more in a 2255 application. The difficulty of defining the specificity required in 2255 applications has been acknowledged by the courts. *Diamond v. United States*, 432 F.2d 35 (9th Cir., 1970). The importance of this issue in post conviction applications and the need for a Supreme Court ruling clarifying the guidelines of the *Price* and *Sanders* cases justify review of the decision below.

CONCLUSION

The conduct of this trial which resulted in a conviction, sentence and substantial fine for a minor altercation and a non-violent assault violated due process. "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," *People v. Savvides*, 1 N.Y.2d 554 (1954). In the instant case justice and due process were sorely lacking. This conviction should not be permitted to stand without further review by this Court.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 30492 and 30519

UNITED STATES OF AMERICA,
Respondent-Appellee,

versus

CARLOS MARCELLO,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(January 4, 1971)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

DYER, Circuit Judge: Marcello, having been convicted of assaulting and intimidating an F.B.I. agent in violation of 18 U.S.C.A. III,[1] which this Court af-

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[1]The statute provides in pertinent part: "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with • • • [any employee of the Federal Bureau of Investigation of the Department of Justice] while engaged in or on account of the performance of his official duties shall be [punished]."

firmed on appeal,[2] now seeks review of the District Court's denial of his motion for a new trial based upon the Government's alleged suppression of evidence, and the denial, without a hearing, of his petition under 18 U.S.C.A. 2255 in which he urged that his conviction was obtained by the knowing use of false testimony. We affirm.

The evidence supporting the conviction is fully developed in the previous opinion of this Court. Suffice it to say that the assault of F.B.I. agent Collins by Marcello occurred on the night of September 30, 1966, at the New Orleans, Louisiana, airport where a number of the news media had gathered to interview and photograph Marcello as he deplaned on his return from New York. A chronology of the post-trial proceedings follows.

After certiorari was denied by the Supreme Court, a timely motion for a new trial was filed alleging that the F.B.I. had tipped off the news media that Marcello would arrive at the New Orleans airport at a certain time from New York and this caused a convocation of the media. Marcello further alleged that the confrontation and harassment leading to the assault was preconceived and that he was entrapped or that he was denied an opportunity to develop facts upon which to raise the defense on entrapment. Relying on *Brady v. Maryland*, 1963, 373 U.S. 83, ____ S.Ct. ____, ____ L.Ed. ____, he points out that he made a motion re-

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[2] *United States v. Marcello*, 5 Cir. 1970, 423 F.2d 993, *cert. denied*, 398 U.S. 939.

questing favorable evidence prior to and during trial and that the Government assured him that it had no such evidence.

At the hearing on the new trial motion, acting agent-in-charge Sylvester, of the New Orleans F.B.I. office, testified that on September 30, 1966, he learned from another agent that Marcello was returning by airplane from New York City that night and that two agents (although he did not know their identity) had been assigned to cover the arrival. He became concerned about the sufficiency of F.B.I. manpower at the airport; and in order to make a judgment about this, Sylvester contacted the Times Picayune, a local newspaper, and asked whether they were covering any prominent person coming in that night on an early evening flight. He was told that no one would be there. He also contacted the Associated Press in the same manner and received an equivocal answer. He then telephoned channel 12 TV and was told that they would have coverage at the airport. A post-trial affidavit offered by Marcello relates that other members of the news media were called. In each instance the recipient of the call probably knew that the caller was Sylvester because of his distinctive voice, but the name Marcello was not mentioned. Sylvester, having determined that Marcello's arrival would be covered by the TV, found no necessity to increase the F.B.I. manpower.

Prior to trial Sylvester related these events to the United States Attorney. Neither F.B.I. agents Collins nor Avigion, who had received the airport assignments, knew that Sylvester had contacted the news

media. The first time that they knew anyone else would be present at the airport was when they saw the group of cameramen and reporters.

At the same hearing, on motion for new trial, Marcello also offered evidence from one witness that he had attended a press party with Collins on September 30, 1966, and that Collins was drunk when they left the party about three in the afternoon. Collins testified that he had no recollection of the events of that day prior to his airport assignment which was made by his superior at about three-thirty or shortly thereafter. The acting agent-in-charge and Avigion, with whom Collins had dinner and carried out the assignment, thought that Collins appeared normal. The District Court denied the motion for new trial.

Subsequently, Marcello filed a § 2255 petition to set aside the judgment of conviction on the ground that it was obtained by the perjury of agent Collins. The District Court denied the petition without an evidentiary hearing.

Denial of the Motion for New Trial

The thrust of Marcello's argument is that the Government, by failing to disclose to counsel for Marcello that F.B.I. agent-in-charge Sylvester had informed the news media of the time of arrival of Marcello at the airport prevented Marcello from using this evidence, in some way, to prove entrapment, or the first step in that defense, or provocation.

Without any knowledge on the part of Collins or Avigion that Sylvester had called the news media, which is undisputed, there is no way, simply no way to introduce entrapment or provocation into the case. The "issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creativity of its own officials." *Sorrells v. United States*, 1932, 287 U.S. 435, 451, . S.Ct. L.Ed. . There was nothing sinister in the nondisclosure by Government counsel that Sylvester made calls to the news media. Not only was this wholly irrelevant to any issue in this case but it borders on the frivolous to claim, as does Marcello, that it was a scheme by the F.B.I. to "set up" an incident at the airport or to invade Marcello's right of privacy. Given a number of newsmen at the airport, whether their presence was because they learned of Marcello's arrival time from the F.B.I., or from independent sources, nothing occurred there that gave cause to Marcello to shout pejorative epithets at them and to assault F.B.I. agent Collins. There was nothing done by the F.B.I. that can be said to have constituted "implantation of the disposition to commit [assault] in the mind of an innocent man, or inducement for the purpose of prosecuting." *United States v. Marcello*, 5 Cir. 1970, 423 F.2d 993, 1011.

Having failed to demonstrate error in the trial court's refusal to submit the issue of entrapment to the jury in the previous appeal, Marcello makes another attempt to do so here via *Brady* by a revelation

that the F.B.I. called the news media but did not disclose this to the defense. Even if this "suppressed evidence" could be considered favorable to Marcello, a conclusion that can be reached only by spurious syllogistic reasoning, it does not come within the *Brady* rule because it was wholly immaterial to the issue of entrapment. Sylvester had a perfectly legitimate purpose in calling three or more news outlets. Neither Collins nor Avigion knew that newsmen would be at the airport which negates any suggestion of an F.B.I. set up. Furthermore, it is manifest that Marcello was the aggressor.

We are firmly convinced that no favorable or material evidence was suppressed by the prosecution and that the trial judge properly denied Marcello's motion for a new trial.[8]

Denial of Petition Under 18 U.S.C.A. 2255.

The District Court denied Marcello's § 2255 petition without an evidentiary hearing because the court found that its factual basis was, for all intents and purposes, presented and considered by the court in connection with the motion for new trial. This is not supported by the record. The motion for new trial was based upon suppression of evidence by the Government, while the § 2255 petition, subsequently filed, asserts

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[8] By brief Marcello contends that the Government also suppressed the fact of Collins' drunkenness on the day of the incident and his inability to recall the events of that day. Not having raised this point in his motion for new trial we decline to entertain it here. Marcello's claim of perjury in this respect is treated post.

that the conviction was obtained through the perjury of F.B.I. agent Collins,[4] a matter which had not previously been considered or decided. Nevertheless, for the reasons that follow we conclude that no evidentiary hearing was required.

Marcello charged perjury in the following particulars: (a) Collins' testimony at trial relating to the assault and intimidation; (b) Collins' denial of admissions made by him that Marcello did not assault or intimidate him; (c) Collins' denial that while he was in Shreveport, Louisiana, in February 1968 he admitted that Marcello did not assault or intimidate him; (d) Collins' denial that while he was in Lucky Pierre's bar in New Orleans in November or December 1967 he admitted that Marcello did not assault or intimidate him; and (e) Collins' testimony in connection with the motion for new trial in which he denied having any recollection of attending a press party on September 30, 1966, or of being drunk on that date.

The contention that Collins perjured himself at the hearing on the motion for new trial gives us little pause. Assuming, contrary to the finding of the District Court, that Collins gave perjured testimony at that hearing in July, 1970, there was no way that this could have borne on the conviction in August, 1968.

With respect to the other allegations of perjury, a review of the evidence submitted at both trials (the

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[4] Marcello also accuses government witnesses Nolan and Gauthier of perjury. While they are not hereafter specifically alluded to by name we consider the legal consequences of their testimony to be precisely the same as Collins.

first having resulted in a mistrial) shows, without peradventure, that there was an encounter between Collins and Marcello at the airport. While there is some conflict concerning the assault by Marcello on Collins, there is substantial evidence that an assault took place.[5] Collins denied at the trial any prior inconsistent statements or admissions to the effect that Marcello had not assaulted or intimidated him on September 30, 1966. On the other hand, Maroun, a close personal confidante and attorney for Marcello, contradicted Collins by relating alleged admissions made by Collins at Lucky Pierre's, but with no one else present,[6] and testified that similar admissions had been made by Collins in Shreveport, Louisiana, in February, 1968.[7] Mrs. Angell, a total stranger whom Collins met in the lounge of Maroun's place, corroborated Maroun's testimony.[8] It is on this conflict of evidence that Marcello charges Collins with perjury.

Perjury may be succinctly defined as knowingly and willfully giving false testimony relating to a material matter. *Luna v. Beto*, 5 Cir. 1968, 395 F.2d 35, 38, *cert. denied*, 1969, 394 U.S. 966; *see United States v. Edmondson*, 5 Cir. 1969, 410 F.2d 670, 672-73, *cert. denied*, 396 U.S. 966. Except for the bald assertion in his § 2255 petition, Marcello has done nothing to demonstrate his

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[5]See the testimony of Collins, pps. 459, 469, 940, 945; Avigion, 402-404, 421, 845, 853, 897; Thornell, 446, 450, 451, 921; Elder, 490-491, 1091, 1097; Nolan, 506, 507, 513, 1031, 1033, 1034, 1035; Joseph Marcello 885, 969-970, 1164; McCrossen, 897, 899, 1035; Joseph Marcello Jr., 604, 631, 1157, 1158; Carlos Marcello, 630, 631, 634, 1268; Gauthier, 1233, 1234, 1262, 1265.

[6]Maroun, 841, 845-7, 849, 1223; Collins 994, 1010.

[7]Maroun, 841-49, 1225, 1246; Collins 492, 995-6, 1012.

[8]Angell 1260, 1263, 1269, 1270-71.

claim that Collins perjured himself. He has offered no evidence, other than that upon which the jury passed, relating to the events constituting the crime. Significantly there were non-government witnesses that corroborated Collins' testimony on the vital trial issues. Marcello's petition simply seeks to reopen and relitigate the issues already resolved against him by the jury. This he cannot do. *Ehrlich v. United States*, 5 Cir. 1944, 145 F.2d 693.

In view of what we have said, an evidentiary hearing was not required to dispose of Marcello's petition. There was nothing to hear that had not already been said.

While we agree with the principle which Marcello couches in broad terms of argument, that due process will not tolerate a conviction obtained by the knowing use of false testimony — *Napue v. Illinois*, 1959, 360 U.S. 264, ____ S. Ct. ____, ____ L.Ed. ____; *Mooney v. Holohan*, 1935, 294 U.S. 103, ____ S.Ct. ____, ____ L.Ed. ____, and their progeny — this principle has no application here because there is no showing by Marcello of any evidence to support his claim of denial of due process other than his persistent attempts to discredit Collins and attack his credibility, all of which were before the jury whose verdict resolved the matter.

The orders of the District Court denying the motion for new trial and for relief under 18 U.S.C.A. § 2255 are severally

AFFIRMED.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30492 & 30519

D. C. Docket No. CR 68-L-89

UNITED STATES OF AMERICA,
Respondent-Appellee,

versus

CARLOS MARCELLO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 4, 1971

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1255

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for a writ of certiorari was filed on January 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the government failed to disclose evidence favorable to petitioner, in violation of the rule in *Brady* v. *Maryland*, 373 U.S. 83.

2. Whether the government knowingly used perjured testimony to convict petitioner.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having assaulted or intimidated a federal agent in the performance of his official duties, in violation of 18 U.S.C. 111. He was sentenced to imprisonment for two years and fined $5,000.[1] The conviction was affirmed on appeal, 423 F. 2d 993 (C.A. 5), and a petition for a writ of certiorari was denied, 398 U.S. 959.

The facts supporting the conviction are set forth in the government's memorandum in opposition to the earlier petition for a writ of certiorari (No. 1488, O.T., 1969). On September 30, 1966, petitioner and his brother, Joseph Marcello, returned from New York to New Orleans by plane. Two F.B.I. agents, Collins and Avignone, were assigned to observe and photograph petitioner's deplaning (Tr. 875).[2] On

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[1] The sentence was later reduced to six months, with two years probation and a fine of $5,000 (Pet. 5 n. 2).

[2] "Tr." refers to the transcript of proceedings at petitioner's first and second trials (the first resulted in a mistrial), a copy of which is on file in *Marcello* v. *United States*, No. 1488, O.T., 1969. "R" refers to the transcript of the hearing con-

arriving at the airport they observed a party of newspaper and television reporters and photographers waiting for petitioner; Avignone then decided to pose as a newspaper photographer (Tr. 838-841; 933). Petitioner's plane arrived at 9:30 p.m. He left the plane and, together with his brother and son, proceeded through the airport lobby to an upper automobile ramp. His party was followed closely by the newsmen, now including Avignone, while Collins, posing as a passenger, walked some 75 feet behind (Tr. 841; 920; 934).

On the ramp, one of the Marcellos turned and, yelling an obscentity, told the newsmen, "Haven't you got enough pictures?" All except Avignone backed away, and petitioner moved toward him; Collins moved forward to assist Avignone if necessary. Petitioner looked at Collins, said "I'm the boss here" and asked Collins if he were looking for trouble. Collins, now backed against the protective railing, replied that he could handle trouble (Tr. 844-846; 935-939; 1027-1029; 1314). Petitioner then jabbed at Collins, making some body contact (Tr. 846; 939-940; 1032-1034; 1293). Petitioner was immediately restrained by his brother and son and an airport policeman. The Marcellos then went to their car and left (Tr. 853; 940; 1035).

At trial, four defense witnesses testified concerning statements allegedly made by Agent Collins after the

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ducted on July 20-21, 1970, on petitioner's Motion for New Trial; we are lodging with the Court the complete transcript of this hearing, and our references are to this complete transcript.

incident. Three of the witnesses were close friends or long-time business associates of the petitioner; the fourth was an acquaintance of one of petitioner's attorneys. Each witness said Collins had admitted that petitioner had not hit him, that the incident was an accident or mistake, and that petitioner would surely win (Tr. 1096; 1115; 1223-1228; 1248; 1260). Collins testified that he had not made any such admissions or discussed the case with any of the four (Tr. 984, 987-992, 996).

Following the denial of his earlier petition for a writ of certiorari, petitioner filed a motion for a new trial, asserting that newly discovered evidence showed entrapment and claiming that the government failed to disclose information favorable to the defense in violation of *Brady* v. *Maryland*, 373 U.S. 83. At the hearing on this motion Joseph Sylvester, who was in charge of the F.B.I.'s New Orleans office on September 30, 1966, testified that prior to petitioner's arrival on that date he telephoned several local newspapers, a television station, and the Associated Press to ascertain whether there would be press coverage of the arrival. Sylvester stated that he did so to determine if he should assign additional agents to cover the arrival; if a large press turnout was expected, there would be little likelihood of trouble and thus no additional agents would be needed. In making each call Sylvester alluded to the arrival of a "prominent person", but did not identify petitioner or the flight he was taking (R. 204-212, 221). Both Collins and Avignone (the only agents on the scene at the airport) testified that they had no

knowledge of the telephone calls or that there would be press coverage at the airport (Tr. 876-877; R. 75-77, 197-198).

Another witness called by petitioner (William Perry Brown) related that on the day of the incident, he and Collins had attended a press party from noon to 3:30 p.m., and that Collins appeared inebriated when they left (R. 91-92, 97-98). Collins could not recall having attended any such party (R. 74-75, 79-80, 84-85, 186, 188-197). The agent who later that day assigned Collins to observe petitioner and the agent with him at the airport testified that Collins appeared normal when he received and carried out his assignment (R. 228-230; 240-242).

The district judge denied the motion for a new trial. The judge concluded that the "newly discovered" evidence concerning Collins' alleged intoxication would not, even if believed, have added to the case (R. 314-315), and that the news media contacts by Sylvester did not have any bearing on the issue of entrapment (R. 312-314).

Subsequently, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255, alleging (Pet. 14) that Collins had committed perjury (1) in denying at trial his alleged prior admissions that petitioner had not assaulted or intimidated him, and (2) in denying at the hearing on the motion for new trial that he recalled attending a press party or his alleged drunkenness. The district court denied the motion without a hearing.

Petitioner appealed from both the order denying a new trial and the Section 2255 order. The court of

appeals affirmed both rulings in a comprehensive opinion (Pet. App. A).

ARGUMENT

1. Petitioner, relying on *Brady* v. *Maryland*, *supra*, argues that the prosecution's failure to disclose Sylvester's communications with news media representatives before petitioner's arrival was an improper withholding of evidence favorable to the defenses of entrapment and provocation (Pet. 9-10). But this information was not material to these defenses.[3] The presence of the press—however it came about—could hardly be regarded under all the circumstances as calculated to induce petitioner to assault Collins. Neither Collins nor Avignone knew of Sylvester's phone calls, or that newsmen would be at the airport. The court of appeals properly found that petitioner was the aggressor and that nothing that occurred at the airport gave cause for petitioner's epithets and assault (Pet. App. A5-A6). Thus, the evidence of Sylvester's calls would not have helped petitioner's case materially.[4]

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[3] The government attorneys at petitioner's first trial, which resulted in a mistrial, knew of Sylvester's call but took the position that the issue of how the news media happened to be present was irrelevant. The district court stated in pretrial proceedings that it would defer ruling on the matter until trial, when it could determine if petitioner was entitled to the information (Tr. 344-347). Petitioner never pursued the matter.

[4] Petitioner's counsel conceded as much in the first pretrial proceeding in the case. When asked by the district judge if the fact that the F.B.I. had notified newsmen of petitioner's

2. In a second *Brady* attack, petitioner contends that the government's failure to disclose Collins' alleged drunkenness the day of the assault was also improper (Pet. 10-11). The court below rejected this claim because petitioner had not raised it in his motion for new trial (Pet. App. 6, n. 3); in any event it is without merit. The government cannot be faulted for not disclosing a subsequently alleged matter which it at all times has believed to be untrue. Indeed, the evidence at the new trial motion hearing showed that Collins was not intoxicated when he received his assignment or later at the time of the assault. The evidence submitted by petitioner relates only to the press party, which ended at 3:30 p.m., and not to Collins' condition some six hours later when the assault occured.

3. In his Section 2255 motion, petitioner claimed that Agent Collins perjured himself on five occasions at the trial and at the hearing on the new trial motion (see Pet. 14). The assertion concerning Collins' trial testimony is supported only by references to the trial testimony of defense witnesses, which the jury obviously disbelieved. The credibility issue had been emphasized by defense counsel's vigorous cross-examination of Collins at trial (Tr. 946-997). And the court below correctly held (Pet. App. A7) that even if there had been perjury at the new trial motion hearing it could not have affected petitioner's earlier con-

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arrival would indicate anything like entrapment, petitioner's counsel replied, "That in and of itself doesn't prove anything" (Tr. 346). As noted, counsel did not thereafter pursue the matter at either trial.

viction.[5] Since there were no questions raised which required a hearing, the district court properly denied petitioner's Section 2255 motion without one. See *Castellana* v. *United States*, 378 F. 2d 231 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD G. SCHERAGÅ,
Attorneys.

MARCH 1971.

[5] The trial judge was not impressed by Brown's testimony at that hearing as to Collin's alleged drunkenness at noon. That Collins in 1970 could not remember what had occurred at a luncheon in September 1966 hardly shows perjury.

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